TEGUH MAJURIA SDN BHD & ORS v. ATSA ARCHITECTS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[CIVIL SUIT NO: WA-23NCvC-28-04-2022]
27 SEPTEMBER 2022

Abstract – *In considering an application for a stay of court proceedings pending the determination of another proceedings, the judge must look at the overall circumstances of both suits, balance the competing interests of the parties and exercise his discretion whether to grant or not to grant a stay to ensure the efficient and fair resolution of the disputes as a whole.*

CIVIL PROCEDURE: *Stay of proceedings – Application for – Two suits involving same parties with substantial overlapping of facts and issues – Gap of 15 months between dates of suits – Whether proceedings ought to be stayed – Applicable test – Factors to be considered*

The first plaintiff had filed a civil suit against the defendants, seeking a declaration that, *inter alia*, the contract by which the first plaintiff had appointed the first defendant as its architect, was illegal as the defendants had appointed an unqualified person as its project architect. In the civil suit, the first plaintiff sought the refund of the fees which the defendants had received. Nine months later, the plaintiffs commenced a defamation suit against the defendant, alleging that a letter sent by the defendant, to a company, was defamatory of the plaintiffs as the letter alleged that the plaintiffs wrongfully tried to evade their obligations to pay the architect fees to the defendants by filing the civil suit. The civil suit was fixed for trial in January 2024 while the defamation suit was fixed for trial from September to November 2022. Before the commencement of the trial of the defamation suit, the defendants filed the present application for the defamation suit to be stayed pending the final disposal of the civil suit ('stay application').

Held (dismissing application):

(1) In considering an application for a limited stay of a Malaysian court proceeding pending the determination before another Malaysian court of related proceedings, the relevant factors to be considered are: (i) which proceeding was commenced first; (ii) whether the decision in one proceeding is likely to have a material effect on the other proceeding; (iii) public interest in saving time and cost and in avoiding inconsistent findings of fact on the same issues and same evidence before two courts; and (iv) the need to balance the advantages and disadvantages to each party arising from the decision to stay or not to stay. (para 18)

(2) In a witness statement filed by the plaintiffs for trial, the witness had set out the facts and allegations in respect of both the civil suit and the defamation suit. There was a substantial overlapping of facts and issues with both the civil suit and the defamation suit clearly grounded on the premise that the architect contract was illegal and the defendants had used an unqualified person to be its project architect. Logically, the degree of overlapping facts required both suits to be heard by one judge. However, despite the duplicity of facts and issues between both suits, the stay application was dismissed as the stay sought was for an order that the defamation suit be stayed pending the final disposal of the civil suit which was 15 months away. (paras 20, 23 & 24)

Obiter:

(1) The defendants, instead of applying for a stay of proceedings, should have filed an application to transfer the defamation suit to be heard together with the civil suit. This would have avoided the duplicity issues which the defendants were clearly concerned about. (para 26)

Case(s) referred to:

AmBank (M) Bhd v. Metal Reclamation (Industries) Sdn Bhd & Ors [2016] 10 CLJ 205 HC ***(refd)***

BNP Paribas Wealth Management v. Jacob Agam And Another [2017] 3 SLR 27 ***(refd)***

Kerajaan Malaysia v. Golden Citrus Sdn Bhd & Ors [2022] 7 CLJ 631 HC ***(refd)***

Ramachandran Meyappan & Ors v. Chellapan K Kalimuthu & Ors [2019] 7 CLJ 788 HC ***(refd)***

For the plaintiffs - Wee Choo Keong & Yeo Wei Min; M/s Wee Choo Keong & Faiz
For the defendants - Abdul Rashid Ismail & Fatin Muneerah Sofian; M/s Rashid Zulkifli

Reported by Najib Tamby

JUDGMENT

Leong Wai Hong JC:

Introduction

[1] On 4 April 2022, the plaintiffs have filed a defamation suit against the defendants ("defamation suit"). About nine months earlier, on 12 July 2021, the first plaintiff has filed a civil suit against the three defendants here as well as a fourth defendant by the name of Mohd Fathi bin Abdullah ("civil suit"). This civil suit is fixed for trial before another court from 22 to 24 January 2024.

[2] The defamation suit is fixed for trial before me on 23 September 2022, 17 October 2022, 4 November 2022, 14 November 2022 and 15 November 2022.

[3] Four days before the commencement of trial before me, *to wit*, on 19 September 2022 the defendants filed an urgent application for the defamation suit to be stayed pending the final disposal of the civil suit ("stay application").

[4] Due to the urgency of the stay application, I heard parties on 21 September 2022 without requiring parties to file written submissions. I dismissed the stay application on the same day. The defendants have now lodged an appeal to the Court of Appeal. These are my grounds of judgment.

[5] The issues before me are:

(i) What is the test to apply for a stay of proceedings of a suit pending the outcome of another suit?

(ii) Is the test the same as the test for a stay of execution of orders and judgments and for stay of proceedings pending disposal of appeals?

(iii) Applying the test, should I grant a stay of proceedings of the defamation suit before me pending the outcome of the civil suit?

[6] It would appear that the test to be applied for a stay of proceedings has not been settled. I will analyse the relevant cases below.

Background Facts

[7] The defendants filed the stay application for an order that the defamation suit be stayed pending the final disposal of the civil suit that is fixed for trial in another court from 22 to 24 January 2024.

[8] The defendants contend a stay should be granted based on the following key facts, which I have reproduced from the defendants' notice of application:

(i) This stay application is made at this juncture in light of the filing of the plaintiffs' witness statement of Hamidon bin Abdullah ("plaintiffs' witness statement") where it has been made obvious that the plaintiffs intend on raising the issue of the defendants' alleged negligence under the Nadayu 801 project, a matter that is also made a central issue as reflected in the civil suit.

(ii) The first plaintiff, in opposing the first defendant's claim for its architectural fees, has commenced the civil suit in the Kuala Lumpur High Court alleging that, amongst other, the contract between the first plaintiff and the first defendant, in the Nadayu 801 project is illegal on the basis the first defendant has allegedly appointed an unqualified architect to act on behalf of the first defendant.

(iii) It is apparent from the plaintiffs' witness statement that the plaintiffs are attempting to raise the same issue of the defendants' alleged negligence in appointing En Fathi for the Nadayu 801 project that was raised in the civil suit to be made as an issue in this defamation suit.

(iv) In the plaintiffs' attempt to raise similar issues as in the civil suit, there would be a risk for duplicity of proceedings where two different findings would be made regarding the same issue.

(v) This stay application is made in good faith and in order to avoid duplicity of proceedings as well as to ensure a fair decision on the issue of the defendants' alleged negligence under the Nadayu 801 project.

(vi) This stay application will not cause any prejudice and/or injustice to the plaintiffs which cannot be compensated with cost as the plaintiffs will still have the opportunity to be heard for both the defamation suit and civil suit.

(vii) Accordingly, the defamation suit ought to be stayed pending the final disposal of the civil suit.

[9] The full facts in support of the application have been set out in the supporting affidavit of Ar Azim bin Abdul Aziz dated 19 September 2022.

[10] The plaintiffs filed an affidavit *via* the third plaintiff dated 20 September 2022 to resist the stay. The plaintiffs contend that the defendants' affidavit in support does not demonstrate special circumstances warranting a stay. The plaintiffs also contend that the stay application was an afterthought made in bad faith and/or *mala fide* at the eleventh hour with the predominant purpose of delaying the fair trial for this suit. The plaintiffs further contend there is no duplicity of proceedings and that this stay should have been filed earlier.

A Review Of The Law On Stay Of Proceedings In Malaysia

[11] Is the test for stay of proceedings the same as the "special circumstances" test which is used for stay of execution of orders and judgments and for stay of proceedings pending disposal of appeals? There are two views that can be gleaned from Malaysian court decisions. There are cases that adopted the "special circumstances" test. However, a recent 2022 High Court decision used the "rare and compelling circumstances" test.

[12] Set out below are the cases in chronological order.

[13] In the 2016 case of *AmBank (M) Bhd v. Metal Reclamation (Industries) Sdn Bhd & Ors* [2016] 10 CLJ 205 (HC), Wong Kian Kheong JC said:

> [31] **There is no previous precedent on how the applicant may persuade the court to exercise its discretion to stay a suit pending the outcome of a specified event. I am inclined to follow the "special circumstances" test** which is applicable to applications for stay of execution of orders and judgments pending disposal of appeals as well as stay of proceedings pending disposal of appeals ("stay pending appeal" applications). The adoption of a similar test of "special circumstances" for stay of proceedings pending the outcome of a certain event, will ensure

uniformity in the exercise of judicial discretion in respect of stay applications irrespective of whether there is a pending appeal or otherwise. There is no reason why I should adopt a test in this case which is different from "stay pending appeal" applications.

(emphasis added)

[14] In a subsequent 2019 case of *Ramachandran Meyappan & Ors v. Chellapan K Kalimuthu &* Ors [2019] 7 CLJ 788; [2019] MLJU 113, HC, Wong Kian Kheong J again adopted the "special circumstances" test and expanded on the test as follows:

[15] In *Pacific Bunkers Pte Ltd v. Owners of the ships or vessels "Geniki Sarawak" and "Geniki Johor" & Another Case (No. 1)* [2015] 2 AMR 887 and *Ambank (M) Bhd v. Metal Reclamation (Industries) Sdn Bhd & Ors* [2016] 10 CLJ 205, I have expressed the following:

(1) The Court has a discretionary power under O. 92 r. 4 RC and/or its inherent jurisdiction to stay the proceedings of a case pending the outcome of a certain event (Stay Order); and

(2) An applicant for a Stay Order has the burden to satisfy the Court of the following two matters (2 Conditions):

(a) There exists special circumstances to justify the Stay Order (first Condition); and

(b) If the Stay Order is not granted, there will be an:

(i) Injustice to any party; or

(ii) Abuse of Court process (2nd Condition).

The appeals to the Court of Appeal against both the above decisions have been dismissed.

[16] ...

[17] I exercise my discretion not to allow encl. 52 for the following reasons:

(1) The plaintiffs have failed to discharge the onus to satisfy this Court that there exists special circumstances in this case to justify a Stay Order. Hence, the non-fulfillment of the first Condition. The AG's Intervention does not constitute a special circumstance to stay This Suit because:

(a) This Suit concerns the Land which is registered in the name of the 5th defendant. The 5th defendant's ownership and rights over the Land have been conferred by ss. 92(1), (2)(a) to (c) and 340(1) NLC. Indeed, such proprietary rights of the 5th defendant in the Land are guaranteed by Article 13(1) of the Federal Constitution (**Constitution**);

(b) Under the NLC and any other written law, the AG has no power over the Land or any "alienated land" (defined in s 5 NLC) for that matter; and

(c) The power to acquire "land" under s 3(1)(a) to (c) of the Land Acquisition Act 1960 (LAA) is vested in the "State Authority" [defined in s 2(1) LAA to mean the "Ruler or the Yang di-Pertua Negeri of the State, as the case may require"]. Section 2(1) LAA defines "land" to include "alienated land" such as the Land in this case. The AG has no power to acquire the Land pursuant to s 3(1)(a) to (c) LAA; and/or

(2) The 2nd Condition is not satisfied in this case as follows:

(a) The 5th defendant's Undertaking had been given on 29.11.2018. Since then, the 5th defendant has unilaterally undertaken to this Court not to enforce the Consent Judgment (11.3.2014) and the WP pending the disposal of encl. 4. The 5th defendant now wishes to proceed with encls. 4 and 20. If encl. 52 is allowed, this will occasion an injustice to the 5th defendant; and/or

(b) *Under O. 34 r. 1(1)(b) RC, the Court has a three-fold duty to ensure a just, expeditious and economical disposal of cases* – please see *Celcom Malaysia Bhd & Anor v. Tan Sri Dato' Tajudin bin Ramli & Ors* [2018] 10 MLJ 397, at paragraphs 19 and 20.

The hearing of encls. 4, 20, 26 and 31 have been postponed from 22.1.2019 to 13.2.2019. Up to the date of this written judgment, the AG has not intervened in This Suit. Furthermore, there is no inkling whether AG's Intervention will ever be made in this case. The Court should not stay a case pending the outcome of an uncertain event. To allow encl. 52 will mean that This Suit will be not be expeditiously disposed of as required by O. 34 r. 1(1)(b) RC.

(emphasis added)

[15] However, recently, in *Kerajaan Malaysia v. Golden Citrus Sdn Bhd & Ors* [2022] 7 CLJ 631 (HC), Kenneth St James JC adopted the "rare and compelling circumstances" test. The learned JC said:

[15] Opposing the application for a stay of proceedings, the LHDN cites the authority of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257; [2003] 5 AMR 758, to argue that there are no "special circumstances" that warrant a stay of execution here.

[16] But the applicable procedural law principle is not "special circumstances". And the defendants are not asking for a stay of execution, but rather a stay of this civil suit proceeding, pending the outcome of another proceeding, because the other proceeding is related to, or will have a bearing on, this suit.

[17] The principle of law to apply is actually the principle of "rare and compelling circumstances". Where there is an application for a stay of proceedings, pending the outcome of another proceeding, a stay of proceeding will not be granted unless there are "rare and

compelling circumstances" that behove the stay of proceedings: *Protasco Bhd v. Tey Por Yee & Another Appeal* [2018] 5 CLJ 299; [2018] MLJU 993 (CA).

[18] In *Protasco* (*supra*), the Court of Appeal, through Her Ladyship Nallini Pathmanathan JCA (as she was then), propounded that when there is an application to stay a proceeding, pending the outcome of another proceeding, the principle to follow is to consider and decide whether there are "rare and compelling circumstances" that necessitate the stay that is sought. The "rare and compelling circumstances" test was formulated by the UK Court of Appeal in *Reichhold Norway ASA & Anor v. Goldman Sachs International* [2000] 1 WLR 173 (UKCA).

[19] This is what Her Ladyship said:

> The Law Relating To Whether The Court Proceedings By Protasco Against Tey And Ooi Should Be Stayed Pending the Resolution of The Arbitration Between Protasco And PT ASU
>
> [32] We have considered the authorities submitted by both parties. The law in relation to the issue of staying proceedings against non-parties pending arbitration is not in substance different in the Commonwealth jurisdictions. However, the threshold to be applied in relation to the right of non-parties to proceed with their actions notwithstanding arbitration agreements, does vary.
>
> [33] In the United Kingdom, the threshold that has to be reached to warrant the grant of a stay of proceedings against non-parties pending arbitration, was considered by Lord Bingham of Cornhill CJ in *Reichhold Norway ASA and Another v. Goldman Sachs International* [2000] 2 All ER 679 ('Reichhold Norway'). That standard was stated to be:
>
> (a) Invoked in "*rare* and *compelling* circumstances";
>
> (b) There ought to be very strong reasons for granting such a stay;
>
> (c) The benefits likely to result from granting such a stay of proceedings must clearly outweigh any disadvantage to the non-party ...

[20] I am mindful that *Protasco* (*supra*) is a matter where the High Court granted a stay of its proceedings, pending the arbitration of another dispute between one of the parties and an extraneous non-party. The Court of Appeal reversed the decision of the High Court – that is, disallowed a stay of the High Court proceedings pending the arbitration – and remitted the matter to the High Court "for trial to be conducted as expeditiously as possible": see para. [96] of *Protasco* (*supra*).

[21] I am also mindful that the High Court case of *Jacob and Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co.kg And Ors* [2013] 1 LNS 914, which was referred to in *Protasco* (*supra*),

A is also a matter where a party applied for a stay of the High Court proceedings pending a Singapore arbitration, where the party who applied for the stay of proceedings is not a party to the arbitration.

…

B [23] Both *Protasco* (*supra*) and *Jacob and Toralf* (*supra*) applied the "rare and compelling circumstances" test, for when there is an application to stay the High Court's proceedings, pending the outcome of an arbitration.

C [24] *I do not think that the "rare and compelling circumstances" test is limited to the circumstance where the application to stay the proceedings is pending the outcome of an arbitration proceeding only. I am of the view that the "rare and compelling circumstances" is indeed the proper general principle to follow, where there is an application for a stay of proceedings, pending the outcome of another proceeding – be it an arbitration proceeding*, or another court proceeding, or as it is here: an appeal proceeding before the Special Commissioners of Income Tax.

D (emphasis added)

[16] Apart from the two tests of "special circumstances" and "rare and compelling circumstances", the Singapore International Commercial Court in *BNP Paribas Wealth Management v. Jacob Agam And Another* [2017] 3 SLR
E 27 ("Jacob Agam") adopted what I would call "the efficient and fair resolution of the dispute as a whole" test when considering an application for a limited (*ie*, temporary) stay of Singapore proceedings pending the determination before the French Court of related foreclosure proceedings and counter-action. The applicant in *Jacob Agam* argued that the grant of a limited
F stay would avoid the risk of conflicting judgments from the overlapping proceedings in Singapore and France.

[17] Speaking through Steven Chong JA (delivering the judgment of the court) the Singapore International Commercial Court in *Jacob Agam* gave the following useful analysis:

G **Legal principles governing a limited stay of proceedings**

[31] The defendants' application is based on s 18(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") read with para 9 of the First Schedule of the same Act. Paragraph 9 reads: Stay of proceedings 9. Power to dismiss or stay proceedings where the matter in question is
H *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts or by reason of a court in Singapore not being the appropriate forum the proceedings ought not to be continued.

Alternatively, the defendants rely on the inherent jurisdiction of the court.

I [32] In either case, the leading authority is *Chan Chin Cheung v. Chan Fatt Cheung* [2010] 1 SLR 1192 ("Chan Chin Cheung"). The Court of Appeal held that the grant of a limited stay order pending the conclusion of other proceedings does not strictly require the application of forum non

conveniens principles because under s 18 of the SCJA read with para 9 of the First Schedule, or alternatively, under the inherent jurisdiction of the court, the court has the full discretion to stay any proceedings before it until whatever appropriate conditions are met (at [47]).

[33] *Chan Chin Cheung* concerned parallel proceedings in Malaysia and Singapore arising from a dispute over the administration of a will. The proceedings were premised on different causes of action – the Malaysian action sought reliefs against the trustees of the estate for breach of their duties to the beneficiaries while the action in Singapore was for defamation by the trustees. However, the Court of Appeal found that the two actions traversed much of the same grounds, and that there was a considerable overlap in the issues to be determined. Thus, it upheld the High Court's order that the Singapore action should be stayed on a temporary basis pending the outcome of the Malaysian proceedings. It was held that this was a sensible and practical order which would allow the Singapore court the benefit of the Malaysian court's findings, and therefore minimise the risk of conflicting judgments. The limited stay was also judged to promote international comity by ensuring that the courts of the two countries would not go on their separate and independent ways (at [46]).

[34] The principles laid down in *Chan Chin Cheung* have been considered in subsequent cases such as *RBS Coutts Bank Ltd v. Brunner Hans-Peter* [2010] SGHC 342 ("RBS Coutts") and *Ram Parshotam Mittal v Portcullis Trustnet (Singapore) Pte Ltd* [2014] 3 SLR 1337 ("Ram Mittal"). These cases have expanded on *Chan Chin Cheung* by approving the following factors, identified by the Federal Court of Australia in *Sterling Pharmaceuticals Pty Limited v The Boots Company (Australia) Pty Limited* (1992) 34 FCR 287 at [16], as relevant (RBS Coutts at [26]; Ram Mittal at [53]):

(a) which proceeding was commenced first;

(b) whether the termination of one proceeding is likely to have a material effect on the other;

(c) the public interest;

(d) the undesirability of two courts competing to see which of them determines common facts first;

(e) consideration of circumstances relating to witnesses;

(f) whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted;

(g) the undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues;

(h) how far advanced the proceedings are in each court;

(i) the law should strive against permitting multiplicity of proceedings in relation to similar issues; and

(j) generally balancing the advantages and disadvantages to each party.

A [35] The above list of factors is *not exhaustive*. Ultimately, the grant of a limited stay of proceedings is a *discretionary exercise of the court's case management powers*. This discretion is triggered when there is a multiplicity of proceedings; and in exercising these powers, *the court is entitled to consider all the circumstances of the case. The underlying concern is the need to ensure the efficient and fair resolution of the dispute as a whole.*

B …

[37] Following on from the above, the key issues to be determined are:

(a) Whether there is an *overlap of issues between the proceedings in Singapore and France which gives rise to a risk of conflicting judgments*; and

C (b) If so, *whether the court should exercise its discretion*, under para 9 of the First Schedule to the SCJA and/or under its inherent powers of case management, *to order a limited stay of proceedings pending the determination of the proceedings in France*.

(emphasis added)

D **[18]** In my view, "the efficient and fair resolution of the dispute as a whole" test is the appropriate test when considering an application for a limited (*ie*, temporary) stay of a Malaysian court proceeding pending the determination before another Malaysian Court of related proceedings. The relevant factors for a court to consider are:

E (i) which proceeding was commenced first;

(ii) whether the decision in one proceeding is likely to have a material effect on the other proceeding;

F (iii) the public interest in saving time and costs;

(iv) the public interest in avoiding inconsistent findings of fact on the same issues and same evidence before two courts;

(v) the need to balance the advantages and disadvantages to each party arising from the decision to stay or not to stay.

G **[19]** Ultimately, the judge must look at all the circumstances of both the suits, balance the competing interests of the adverse parties and exercise his discretion whether to grant or not grant a stay to ensure the efficient and fair resolution of the dispute between the parties as a whole. The overall interests of justice are the paramount consideration for a judge deciding whether or not to grant a stay of proceedings of a suit pending the outcome of another suit.

H **Application Of Law To Facts**

[20] In my view, there is a certain degree of overlapping facts and issues between the civil suit and the defamation suit that logically requires both suits to be heard by one judge.

I

[21] In the civil suit, the first plaintiff here has filed a suit against the first to third defendants here for a declaration that the contract by which the first plaintiff had appointed the first defendant here as its architect for a commercial project is illegal as the first to third defendants here had appointed the fourth defendant, an unqualified person under the Architect Act 1967, as its project architect or senior project architect, consequently, the first defendant here is not entitled to its architect fees, first to third defendants here refunded RM2,060,836.44 that they had received as fees under an illegal and void contract, special damages of RM22,800,000 interest and costs.

[22] In the defamation suit, the three plaintiffs pleaded the facts of the civil suit in relation to the dispute between the parties. The plaintiffs then alleged that a letter sent by the defendants here to a company called Sterling Prime Sdn Bhd was defamatory of the plaintiffs as the letter alleged that the plaintiffs wrongfully try to evade their obligations to pay the architect fees to the defendants by filing the civil suit falsely accusing the defendants of having an illegal practice.

[23] In the witness statement of Hamidon bin Abdullah filed by the plaintiffs for trial, the witness has set out the facts and allegations in respect of both the civil suit and the defamation suit. It is clear there is a substantial overlapping of facts and issues with both the civil suit and the defamation suit clearly grounded on the premise that the architect contract is illegal and the defendants had used an unqualified person to be its project architect or senior project architect.

[24] Despite the duplicity of facts and issues between both suits, I am constrained to dismiss the stay application as the stay sought is for an order that the defamation suit be stayed pending the final disposal of the civil suit that is only fixed for trial on 22 to 24 January 2024. That is about 15 months away.

[25] If the civil suit trial is fixed for trial, say, early to middle of next year, I would have exercised my discretion to grant a stay of proceedings based on the factors outlined above, in particular, because the civil suit was filed first and its determination whether the architect contract is illegal, *etc* will have a material effect on the outcome of the defamation suit.

[26] Lastly, it is my view that the defendants instead of applying for a stay of proceedings should have filed an application to transfer this suit to be heard together with the civil suit. This would have avoided the duplicity issues which the defendants are clearly concerned about.

[27] In the premises, I am constrained to dismiss the stay application with costs.